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PATRICK E. DUFFY

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

UNITED STATES OF AMERICA,	)	CR 05-07-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
W. R. GRACE, ALAN R. STRINGER,	)	
HENRY A. ESCHENBACH, JACK W.	)	
WOLTER, WILLIAM J. McCAIG,	)	
ROBERT J. BETTACCHI, O. MARIO	)	
FAVORITO, ROBERT C. WALSH,	)	
	)	
Defendants.	)	
_____	)	

**I. Introduction<sup>1</sup>**

The Defendants have filed a motion in limine to exclude the expert testimony of Government witness Dr. Aubrey Miller regarding the danger posed to Libby residents by alleged releases

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<sup>1</sup>The facts of this case are well known to the Court and the parties and will be recited here only when necessary. See U.S. v. W.R. Grace, F.R.D. 586, 587-88 (D. Mont. 2005).

of asbestos into the ambient air after November 3, 1999.<sup>2</sup> The Defendants argue that Dr. Miller's testimony does not satisfy the requirements of Federal Rule of Evidence 702 as interpreted by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Government opposes the motion. For the reasons that follow, I find that Dr. Miller's testimony is admissible and the issues raised by the Defendants are properly developed through cross-examination at trial.<sup>3</sup>

## II. Background

Dr. Aubrey Miller, then a public health official with the Agency for Toxic Substances and Disease Registry (ATSDR), served as a member of the team investigating hazardous waste contamination in Libby beginning in November 1999. Dr. Miller helped to design ATSDR's medical screening program, which sought to identify potential pathways to exposure to asbestos contaminated vermiculite in Libby, and was co-author of a study based on the program's findings entitled *Radiographic Abnormalities and Exposure to Asbestos-Contaminated Vermiculite*

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<sup>2</sup>The Court has previously determined that any violations of the Clean Air Act's knowing endangerment provision, 42 U.S.C. § 7413(c)(5)(A), that became complete before November 3, 1999 are time-barred under the statute of limitations. See United States v. Grace, 427 F.Supp.2d 1207, 1239 n.30 (D.Mont. 2006).

<sup>3</sup>The Government filed a second Notice of Appeal in this case on August 23, 2006 (Doc. No. 730), resulting in a partial divestiture of this Court's jurisdiction. The Court retains jurisdiction to decide the issues presented in this motion, however. See City of L.A. v. Santa Monica Baykeeper, 254 F.3d 882, 886 (9th Cir. 2001).

*in the Community of Libby, Montana, USA.*<sup>4</sup>

As part of his duties in Libby Dr. Miller submitted a report on September 29, 2005 to Libby Asbestos Site Regional Project Manager Jim Christiansen presenting Miller's rationale for his determination of "imminent and substantial endangerment to public health from asbestos contamination in various types of source materials at residential and commercial properties in and around the community of Libby, Montana." The report serves as the summary of Dr. Miller's opinion testimony in his Supplemental Disclosure.

In reaching his conclusion Dr. Miller relies upon historical studies showing a causal relationship between occupational exposure to Libby amphibole and the development of asbestos related disease for the proposition that exposure to Libby amphibole can cause lung disease. He then looks to other sources, including case studies, studies showing that non-occupational exposures can result in asbestos disease, a pilot study of environmental cases in Libby, and the ATSDR screening program, for the proposition that post-1999 non-occupational exposures in Libby caused imminent and substantial endangerment

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<sup>4</sup>The admissibility of the ATSDR medical testing program is discussed in a separate Order. See August 31, 2006 Order granting Defendants' motion to exclude expert testimony relating to the ATSDR screening program. In light of that Order, Dr. Miller will not be permitted to give an opinion on the ATSDR screening program's findings. This does not affect the admissibility of Dr. Miller's ultimate conclusion regarding endangerment.

to public health.<sup>5</sup> Dr. Miller also intends to testify that certain post-1999 releases in Libby resulted in exposures in excess of the 1994 Occupational Safety and Health Administration (OSHA) permissible exposure limit (PEL) and the Environmental Protection Agency's (EPA) cancer risk guidelines.

### III. Analysis

#### A. Legal standard

Rule 702 governs the admissibility of expert testimony. In Daubert v. Merrell Dow Pharmaceuticals, Inc., the Supreme Court established that trial courts are obligated to perform a gatekeeping role with respect to expert testimony. 509 U.S. 579 (1993). That obligation was characterized by the Court as requiring trial judges to vet proffered scientific and technical evidence for the purpose of ensuring that it "is not only relevant, but reliable." Id. at 589. The Supreme Court in Daubert listed four nonexclusive factors that a trial court might, in the exercise of its discretion, consider to assess reliability: 1) whether a theory or technique can be tested; 2) whether it has been subjected to peer review and publication; 3) the known or potential error rate of the theory or technique;

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<sup>5</sup>The imminent and substantial endangerment formulation differs from the standard of the Clean Air Act's knowing endangerment provision under which the Defendants are charged in Counts II-IV, which requires that a defendant's knowing release place another person "in imminent danger of death or serious bodily injury." 42 U.S.C. § 7413(c) (5) (A).

and 4) whether the theory or technique enjoys general acceptance within the relevant scientific community. Id. at 593-94. Later cases have made clear that these factors are not exclusive, and that trial courts have wide latitude in making both the determination of whether an experts testimony is reliable and in deciding which factors go into making that determination. See, e.g., Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).

Assessing the relevance of expert testimony under Daubert involves making a determination as to whether the testimony is sufficiently tied to facts of the case to be useful to the trier of fact in resolving a factual dispute. 509 U.S. at 591. Relevant expert testimony is that based upon evidence that has a valid scientific connection to material facts in dispute. Id. at 591.

#### **B. Discussion**

The Defendants argue that Dr. Miller's opinions must be excluded under Rule 702 because they are unreliable. Specifically, the Defendants contend that Dr. Miller has identified no reliable methodology for extrapolating the findings of studies showing disease caused by high-intensity, high frequency exposures and applying them to the lower intensity exposures that likely occurred as the result of alleged releases after November 3, 1999. The Defendants contend Dr. Miller's

reliance on the OSHA PEL as a benchmark is unreliable because there is no admissible evidence of post-1999 releases in Libby that exceed the OSHA PEL. Neither argument presents a compelling basis for excluding Dr. Miller's testimony.

The Defendants demand that Dr. Miller provide a "valid scientific methodology" to support his opinions on endangerment. Defs' Br. (Doc. No. 457) at p. 2. "Methodology" has become a shibboleth for the Defendants in their expert related motions in limine, but it must be remembered that Daubert and Rule 702 are "not intended to provide an excuse of an automatic challenge to the testimony of every expert." Advisory Committee Notes to the 2000 Amendments to Rule 702. The Defendants' objection to Dr. Miller's testimony lies in the fact that he has not provided a valid epidemiological study showing a direct casual link between asbestos-related disease and non-occupational exposures to Libby amphibole identical in intensity and duration to those resulting from the alleged post-1999 releases.

The Defendants seek more than the law requires. Dr. Miller's qualifications are beyond question. His theory, i.e., that exposure to airborne releases of Libby amphibole can result in asbestos-related disease, enjoys general acceptance.<sup>6</sup> It is

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<sup>6</sup>The Defendants concede the truth of the basic premises underlying Dr. Miller's opinion: "It is uncontested that tremolite asbestos fibers of the type present in Libby can be hazardous to human health, and it is also uncontested that fibers have been released in the ambient air in Libby." Defs' Br. at p. 5.

appropriate for Dr. Miller to rely upon his training and experience to interpret the existing epidemiological studies and other information on non-occupational and low-level exposures and offer an opinion as to the danger posed by the alleged post-1999 exposures in Libby. The reliability of such an opinion is not contingent on the presentation of a study measuring the effects of precisely the same exposure levels. "Daubert does not require that every aspect of a theory of medical causation be supported by research on the identical point." Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 607 (9th Cir. 2002). To the extent the Defendants have identified weaknesses in Dr. Miller's methods and conclusions, they should be developed through cross-examination at trial. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

The Defendants oppose Dr. Miller's reliance on the 1994 OSHA PEL of 0.1 fibers/cc because the PEL does not "fit" the issues in the case. Although the Defendants contend that the testimony is unreliable, their argument invokes the relevance prong of the Daubert analysis. They contend the PEL does not fit the issues because 1) all admissible measurements of post November 3, 1999 fiber levels in Libby are below the PEL and 2) the PEL cannot be employed as a standard for non-occupational exposures because the

PEL assumes continuous exposure in a workplace over an eight-hour day for a 40-year working life.

The Defendants do not dispute that some of the samples taken in Libby after November 3, 1999 exceed the OSHA PEL, but argue that those samples are inadmissible because they were taken from inside buildings and therefore do not measure ambient air releases. The Court has previously declined to make pretrial determinations about the admissibility of specific samples. See August 27, 2006 Order on Defendants' motion to exclude evidence of or derived from indoor releases (Doc. No. 740). Contrary to the apparent preference of the Defendants, the resolution of some of the issues in this case must await trial. "[T]he trial court's role as a gatekeeper is not intended to serve as a replacement for the adversary system." Advisory Committee Notes to the 2000 Amendments to Rule 702 (citing United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996)). Moreover, the Defendants may rely on cross-examination or contrary evidence to illuminate the assumptions underlying the PEL with regard to duration of exposure and to discuss the effect of those assumptions on the applicability of Dr. Miller's opinions.


#### **IV. Order**

The Defendants have not identified any valid basis for the exclusion of Dr. Miller's testimony. His opinions meet the



threshold standards of reliability and relevance established in Daubert and Rule 702. Accordingly, IT IS HEREBY ORDERED that Defendants' motion to exclude the testimony of Dr. Aubrey Miller (Doc. No. 457) is DENIED.

DATED this 31<sup>st</sup> day of August, 2006.

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Donald W. Molloy, Chief Judge  
United States District Court  
